ARE THERE TOO MANY MURDER TRIALS?

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TWO FEATURES OF CRIMINAL JUSTICE IN THE 1980S HAVE BEEN THE greatly increased emphasis on pre-trial prosecution decision-making and the quest for a more efficient use of scarce resources of time, money and personnel. The publication for the first time of the *Prosecution Policy of the Commonwealth,* in 1982 was subtitled 'Guidelines for the making of decisions in the prosecution process and the considerations upon which these decisions are made' (Australia. Attorney-General's Department 1982). And quite recently, the Directors of Public Prosecutions and senior Crown Prosecutors of the various Australian jurisdictions have agreed upon a common set of prosecutorial guidelines setting out the criteria to be employed when deciding whether or not to prosecute (Victoria. Office of the Director of Public Prosecutions 1991). These guidelines now provide a yardstick against which the operation of a prosecution authority may be evaluated. The continued need for efficiency is more than amply demonstrated by the existence of a deep and long-lasting recession, the growth in the number of lengthy criminal trials and financial pressures on government and legal aid bodies.

The task of a prosecution authority is the preparation and prosecution of criminal cases. Central to that task is the decision whether or not to charge and the choice of charge. As the national Prosecutorial Guidelines state:

> The decision whether or not to prosecute is the most important step in the prosecution process (Victoria. Office of the Director of Public Prosecutions 1991, p. 59).

This paper presents some Victorian data on homicide prosecutions and discusses the implications of the data in evaluating prosecution decisions and

prosecution policy. It also considers the potential of such data in guiding prosecution decision-makers. The paper is not intended as a complete critique; its aim is essentially to ask questions and raise issues.

The Data

The Law Reform Commission of Victoria (1991a) conducted a study of all homicide cases handled by the state prosecution authority in Victoria between 1981 and 1987 (hereafter called the *Homicide Prosecutions Study*). The study did not include cases prosecuted under s. 318 of the *Crimes Act 1958* (Vic.) for 'culpable driving causing death'. The key source of information for this study was the files of the Director of Public Prosecutions.

Over the period surveyed there were 259 homicide victims and 302 accused. A number of cases involved multiple accused and/or multiple victims. In the study, these cases are classified by what are called 'accused-victim pairs'. Thus, if a homicide event involved two accused and three victims, there would be six accused-victim pairs - each such pair linking a separate accused and victim. In a case involving one accused and one victim there is one accused-victim pair. In this study there were 319 accused-victim pairs.

Table 1 sets out the presentment decisions made by the prosecution authority in these 319 cases.

Table 1

Presentment

Offence	Number	Per cent
Murder	206	64.6
Manslaughter	89	27.9
Infanticide	6	1.9
Nolle prosequi	16	5.0
Other	2	0.6
Total	319	100.0

Source: *Homicide Prosecutions Study*, Table 44, p. 61.

It will be seen that nearly two thirds of all cases were presented on murder, and a little over one-quarter of the sample was presented on manslaughter.

Table 2 sets out the results of the 206 cases presented on murder.

Table 2

Results of Cases where Accused Presented on Murder

Result	Number	Per cent
Murder	58	28.1
Manslaughter	92	44.7
Acquitted	33	16.0
Not Guilty but insane	12	5.8
Nolle prosequi	2	1.0
Other	9	4.4
Total	206	100

Note: Adopted from *Homicide Prosecutions Study*, Table 47, p. 68.

These data need some further comment. Of the thirty-three acquittals, ten were directed acquittals ordered by the judge. The most common outcome of these murder presentments was manslaughter: in ninety-two (or about 45 per cent) of the 206 cases. Of these ninety-two cases, seventeen were guilty pleas before the trial day, fifteen were guilty pleas accepted at the start of, or during, the murder trial, and the remaining sixty cases were jury verdicts.

If one defines success rate for murder presentments in terms of achieving a murder conviction then, on the face of it, fifty-eight murder convictions for 206 murder presentments is not a high success rate—less than 30 per cent. Even if the seventeen guilty pleas to manslaughter entered before the trial day are excluded, the success rate is still only around 30 per cent. If, however, the measure of success is the total of murder and manslaughter convictions, then the success rate is nearly 75 per cent. This paper adopts as its success rate the number of murder convictions obtained, in part because persons can in fact be presented for manslaughter.

Some comparisons at this point are instructive. Unlike Western Australia, Queensland and Tasmania, which have a criminal code, the law in New South Wales and South Australia, as in Victoria, is still essentially common law murder and manslaughter. Hence comparisons between jurisdictions in the area of homicide are best made with New South Wales and South Australia.

Unfortunately in New South Wales, data on higher courts criminal cases are not available for the years 1983 to 1987, and some of the 1988 data has proved unreliable. Table 3 sets out the results of cases in New South Wales for the period 1989–90 where persons were indicted for murder.

The success role in terms of murder convictions is substantially higher than for Victoria. However, this sample is over a different and shorter period when the penalty for murder had been changed and in a jurisdiction where the maximum penalty for manslaughter is life imprisonment.

Table 3

Results of Cases in New South Wales where Accused was Indicted for Murder 1989–90

Result	Number	Per cent
Murder	60	39.5
Manslaughter	40	26.3
Acquitted	47	30.9
Other	5	3.3
Total	152	100.0

Note: Information provided by I. Crettenden, New South Wales Bureau of Crime Statistics and Research.

Table 4 sets out the result for the period 1982–90 of cases in South Australia where the accused was indicted on murder.

Table 4

Result of Cases in South Australia for Period 1982–90 where Accused was Indicted for Murder

Result	Number	Per cent
Murder	56	44.1
Other offence	39	30.7
Acquitted	12	9.4
Not guilty but insane	11	8.7
Nolle prosequi	9	7.1
Total	127	100.0

These South Australian figures cover a slightly longer period (1982–90) than the Victorian period of 1981–87, but the periods substantially overlap. On these data, fifty-six (or just under 45 per cent) of the 127 cases resulted in a murder conviction. Moreover, of the thirty-nine cases resulting in a conviction for a lesser offence (generally manslaughter), at least nine were guilty pleas. If these cases were excluded, then the success rate would be approaching 50 per cent (fifty-six murder convictions in 118 cases).

Of course, comparisons such as these must always be treated with caution, being based on different jurisdictions and legal cultures with perhaps different pressures and expectations. Nevertheless, the differences are sufficiently substantial to raise some concerns about the Victorian results.

A further comparison, this time of other offences in Victoria, is worth considering. Rape offences are offences where traditionally there has been a higher than average acquittal rate. The following data based on the files of the Office of the Victorian Director of Public Prosecutions cover all accused charged with a rape offence in 1989 and proceeded with on presentment (unpublished data provided by the Victorian Bureau of Crime Statistics and Research). Tables 5 and 6 set out the results of persons presented on aggravated rape and rape respectively whose case came to the Office of the Director of Public Prosecutions in 1989. Some of these persons were presented in 1989 and some in 1990. The data is person-based—provided a person is convicted of at least one count of rape, this is recorded as 'convicted-rape'.

Table 5

Results of 1989 Cases where Persons Presented for Aggravated Rape

Result	Number	Per cent
Convicted – aggravated rape	24	63.1
Convicted – rape	3	7.9
Convicted – other offence	3	7.9
Acquitted	8	21.1
Total	38	100.0

Table 6

Results of 1989 Cases where Persons Presented for Rape

Result	Number	Per cent
Convicted – rape	28	59.6
Convicted – other offence	6	12.8
Acquitted	13	27.6
Total	47	100.0

The success rate is quite high compared with the success rate for murder presentments—around 60 per cent of persons are convicted of the offence on

which they were presented. However, a word of caution is necessary. Of the twenty-four persons convicted of aggravated rape, sixteen pleaded guilty, and eight only out of twenty-two were convicted after a trial. Of the twenty-eight persons convicted of rape, eighteen pleaded guilty and ten only out of twenty-nine were convicted after a trial. In the *Homicide Prosecutions Study*, for most of the period (1981–June 1986) there was a mandatory life sentence for murder and virtually no guilty pleas. Nevertheless, this data on rape offences does provide a useful point of comparison.

The Victorian data also enables further refinement. The researchers in the study classified homicides according to the 'context' of the killing. 'Context' here means more than simply the relationship between the accused and the victim. Context relates to the situational factors which led to the offence. The *Homicide Prosecutions Study* explains this categorisation in the following way:

> The context is the set of significant circumstances interpreted as motivating or underlying the offence. Information as to relationship does not necessarily give the full picture. For example, a person who killed their sexual partner might have done so in a 'domestic' context, but the offence might also have occurred in a dispute over drug dealing. The classification of context will therefore depend on which of these contexts could be identified, from the data on the DPP file, as the primary one.
>
> Most homicides occurred either in a domestic context or in the context of an argument. 'Domestic' here means arising out of a domestic relationship, that is, either between persons living together as a family, or between persons relating as a family although living apart. Thus it includes brothers and sisters, and estranged spouses/lovers, where the 'domestic' relationship was the context of the homicide, as distinct from, say, drug dealing or a robbery. An event was only recorded in the primary classification 'argument' if it was not otherwise considered as domestic or as arising out of sex-rivalry. 'Argument' might include, for instance, a killing in the course of a pub brawl. (Law Reform Commission of Victoria 1991a, p. 47).

These classifications depend, of course, on the materials on files and on the judgement and interpretation of the researchers. Doubtless, in some cases, there could be disputes about classification. However, this categorisation is based on an analysis of primary, relevant material and can reasonably be expected to present at the very least a broadly accurate picture. The three major, primary contexts for homicide in the study were:

- domestic — 100 cases out of 319, or 31.3 per cent;
- argument — 98 cases out of 319, or 30.7 per cent; and
- robbery — 36 cases out of 319, or 11.3 per cent.

There were also five cases classified as having a primary context of 'contract killing'. The processing and outcome of these cases is of some interest.

Choice of presentment

- For the 'domestic' category, about two thirds were presented on murder and just on one quarter for manslaughter;
- for the 'argument' category, about two thirds were presented on murder and just under one third presented on manslaughter.
- for the robbery cases, over 80 per cent were presented for murder; and
- for the 'contract killing' cases all five (or 100 per cent) were presented for murder.

Outcome

Table 7 sets out the presentments and outcomes of the 'domestic' homicides.

Table 7

Presentments and Outcomes in Domestic Homicides (n = 100)

	Presentment	Outcome
Murder	66	11
Manslaughter	24	49
Infanticide	5	5
Not proceeded with	5	5
Acquitted	na	16
Not guilty but insane	na	10
Other	na	4
Total	100	100

Note: Adopted from *Homicide Prosecutions Study*, Table 45, p 62.

Of those presented for murder in the 'domestic' category, only one in six (or 17 per cent) was convicted of murder, with a substantial number being convicted of manslaughter. The low proportion of murder convictions is striking and must raise questions about the choice of presentment in at least some of the cases.

The same pattern emerges with the 'argument' category of homicide with a low rate of conviction for murder and a rather higher acquittal rate with twenty-four (or nearly 25 per cent) of the group being acquitted. Here, too, similar concerns arise about the choice of murder presentments in light of the low murder conviction rate.

Predictably, in the robbery and contract killing categories, there was a higher proportion of murder convictions obtained—ten out of twenty-nine (or nearly 35 per cent) in robbery cases and three out of five (60 per cent) in the contract killing cases.

The Victorian study also examined various defences used in the homicide cases. This information was obtained from the files and especially from the transcript of the hearing. However, since the addresses of counsel and the trial judge's charge to the jury were often not available, it was not always possible to know whether defences which seemed relevant were actually put to the jury (Law Reform Commission of Victoria 1991a, p. 74) That having been said, however, this analysis represents a great advance on anecdote and impression, and provides a solid, empirical base for the analysis of defences in homicide cases. It is not relevant to this discussion to outline all, or even most, of the findings in the study with respect to defence issues raised. However, some general findings should be reported. Firstly, 'in most cases argument centred on the mental state of the accused rather than the physical circumstances of the event' (Law Reform Commission of Victoria 1991a, p. 74). Secondly, more than one line of defence was usually in issue. Not surprisingly, intention was in issue in over 60 per cent of cases (Law Reform Commission of Victoria 1991a, p. 74).

In the 319 cases, the incidence of the defences of provocation, self-defence and excessive self-defences was as follows:

- provocation was an issue in seventy-five cases (23.5 per cent);
- self-defence was an issue in sixty-six cases (20.7 per cent); and
- excessive self-defence was an issue in forty-nine cases (15.4 per cent).

Often, of course, these defences were argued together in cases. (Law Reform Commission of Victoria 1991a, p. 75).

Provocation

As stated above, provocation was an issue (not necessarily the dominant issue) in seventy-five cases. Of these cases, fifteen were presented for manslaughter and sixty presented for murder. Of the fifteen cases presented for manslaughter, eight had been committed for murder. Moreover, eleven of these cases were 'argument' homicides, and only four 'domestic' homicides.

Table 8 sets out the results by gender of accused of cases presented for murder where provocation was an issue.

It will be observed that for male accused, just over one-quarter were convicted of murder and thirty-two (or about 60 per cent) were convicted of manslaughter. While the numbers of female accused are small, the comparison is of interest: none was convicted of murder and four (or about 60 per cent) were convicted of manslaughter. The manslaughter conviction rate is approximately the same for both genders.

Table 8

Result by Gender of Accused in Murder Presentments where Provocation was an Issue

Result	Male	Female	Total
Convicted murder	13	—	13
Convicted manslaughter	32	4	36
Not guilty — insane	2	—	2
Guilty plea to manslaughter	1	—	1
Acquitted	2	2	4
Acquitted — self defence	1	—	1
Other	—	1	1
Nolle prosequi	2	—	2
Total	53	7	60

Note: Adopted from *Homicide Prosecutions Study*, Table 57, p. 79.

However, when the gender of the victim is taken into account, significant differences appear. Table 9 sets out the outcomes for murder presentments involving male accused where provocation was an issue according to gender of the victim.

Table 9

Outcomes According to Gender of Victim of Murder Presentments with Male Accused where Provocation was an Issue

Result	Male Victim	Female Victim
Murder	5	8
Manslaughter	20	12
Other	7	1
Total	32	21

In these cases, if there is a male victim, the murder conviction rate is quite low: five out of thirty-two cases, or about 16 per cent. However, when the victim is female, the murder conviction rate is much higher: eight out of twenty-one cases, or nearly 40 per cent. Over this period then, the prosecution

has had much greater success in cases involving provocation where there is a male accused and a female victim.

For the sake of completeness, of the seven murder presentments where provocation was an issue and the accused was female, one involved a female victim and six involved male victims. The case involving a female victim resulted in a manslaughter conviction and of the six cases involving male victims four resulted in manslaughter convictions. In three other cases where provocation was an issue, the female accused was presented for manslaughter.

Self-Defence

Self-defence was an issue in thirty-seven murder presentments and excessive self-defence in twenty-nine murder presentments. Since the decision in *Zecevic v. Director of Public Prosecutions* [1987] 162 CLR 645, excessive self-defence has ceased to be a defence and so will not be discussed in this paper. Table 10 sets out the result of murder presentments where self-defence was an issue.

Table 10

Result of Murder Presentments where Self-Defence Was An Issue

Result	Number	Per cent
Murder	8	21.6
Manslaughter	17	45.9
Acquittal	11	29.7
Nolle prosequi	1	2.7
Total	37	100.00

Note: Adopted from *Homicide Prosecutions Study*, Table 58, p. 81.

In these self-defence cases, there is a comparatively high acquittal rate, nearly 30 per cent, compared with the 16 per cent acquittal rate for all cases presented for murder.

Summary

These data show that in the study period 1981–87, the success rate defined as the proportion of murder presentments resulting in murder convictions was only around 30 per cent, a figure considerably lower than in South Australia where over the period 1982–90, the success rate was just under 45 per cent. Of the forty-seven females accused in this study, twenty-six were presented for

murder but none was convicted of murder. The fifty-eight persons convicted of murder were all male.

There are other findings of special note. In cases classified as 'domestic', for every six presented for murder, only one resulted in a murder conviction. A similar low success rate was found to exist in 'argument' cases. In cases where provocation was identified by the researchers as an issue (whether or not in connection with other defences), substantial differences emerge linked with gender. For male accused presented for murder, a murder conviction outcome was about two times more likely if the victim was female. For female accused presented for murder (there were only seven), none resulted in a murder conviction. In cases presented for murder where self-defence was an issue, the acquittal rate was nearly twice as high as the average of all cases presented for murder. These findings raise a number of important issues related to prosecution decision-making.

Discussion

Criticisms of prosecution decision-making

The low murder conviction rate may suggest that prosecution choice of charges is being made inappropriately. That criticism has been made on a number of occasions. Seifman (1982, p. 88) wrote that 23 per cent of a sample of judges who were interviewed with regard to plea negotiations had indicated that there should be less overcharging. The Legal and Constitutional Committee of the Victorian Parliament noted that a number of witnesses had considered that overcharging was a problem (Victoria. Parliament. Legal and Constitutional Committee 1984). In particular, Mr O'Brien of the Legal Aid Commission of Victoria claimed that frequently the prosecution overcharged and then refused to accept reasonable offers of guilty pleas. In its *Report on Criminal Trials*, the Shorter Trials Committee noted that it had received expressions of concern about overcharging from some Victorian judges and experienced criminal barristers (Australia. Shorter Trials Committee 1985). More recently, in its report on homicide, the Law Reform Commission of Victoria (1991b, p. 43) noted that senior members of the Legal Aid Commission argued that one explanation for the low success rate in murder cases of the prosecuting authority was overcharging. The Law Reform Commission of Victoria itself saw this low success rate as cause for concern and recommended a review of prosecution decision-making in respect of the laying of murder charges.

It should be noted that, apart from the response of the Legal Aid Commission in 1991 to the low murder conviction rates found in the 1981–87 study, none of the reported concerns and criticisms about overcharging related specifically to murder prosecutions. Moreover, the criticism was generally in terms of impressions and beliefs. As the Shorter Trials Committee stated:

> It needs to be mentioned at the outset that the Committee has before it no concrete, empirical evidence of overcharging and overloading of

> presentments. It is, of course, a difficult matter to gather firm evidence about. Whether presentments are overloaded is often very much a matter of opinion (Australia. Shorter Trials Committee 1985, p. 59).

Interestingly, Mr O'Brien of the Legal Aid Commission in part based his claim of overcharging on some 1982 data where in eight cases clients of the Legal Aid Commission were charged with attempted murder. In each case, an offer to plead to a lesser count was made but rejected by the prosecution, and only one of the eight was convicted of 'attempted murder', the rest being either acquitted or convicted of lesser counts. Commenting on these figures, Mr O'Brien stated:

> It has been said to me by prosecution representatives that the fact that a jury verdict is the same as we offered to plead to, or a lesser count, there is no indication that our original offer was a reasonable one. I concede that in an isolated case. But when you get a pattern over a period of years and a multiple number of cases where the pleas that we are offering are either accepted at the door of the court by the Crown or alternatively the jury verdict is a conviction on the count we have offered, that is a conviction on a lesser count, I say that pattern demonstrates that we are reasonable in our offers and that ... there ought to be more effective plea negotiation (Victoria. Parliament. Legal and Constitutional Committee 1984, p. 89).

Responding to Mr O'Brien's data and claims, Mr Hassett—then a Prosecutor for the Crown and now a County Court Judge—having noted that 'it could not be said in relation to any particular case that the [prosecution] decision was wrong', nevertheless continued:

> I do not mean thereby to suggest that the figures that Mr O'Brien has [put forward] ought to be disregarded. They are significant and I think it behoves the Director of Public Prosecutions to be aware of them (Victoria. Parliament. Legal and Constitutional Committee 1984, p. 93)

It is in the spirit of these remarks of Mr Hassett—as he then was—that the findings of the 1981-87 *Homicide Prosecutions Study* should be discussed.

The criteria for prosecution decision-making

The study period 1981–87 saw two different agencies responsible for prosecutions in Victoria. The conduct of prosecutions in the higher courts was taken over by the Office of the Director of Public Prosecutions in 1983. Before that time, the Criminal Law Branch of the Crown Solicitor's Office had been responsible for the preparation of those cases.

However, for most, if not all, of the study period, the major criterion used in making prosecution choices has been what is often referred to as the 'reasonable prospect of conviction' test. The discussion will be based on that test, since it is now the key element in the Prosecutorial Guidelines adopted by all Australian jurisdictions.

Under these Guidelines (Victoria. Office of the Director of Public Prosecutions 1991, par. 4), the existence of a bare prima facie case is not enough to 'justify the institution or continuation of a prosecution'; there should not be a

prosecution 'if there is no reasonable prospect of a conviction being secured'. There is no definition in the Guidelines of the term 'reasonable prospect of conviction'. However, the Guidelines do spell out the matters to be taken into account in determining whether there is a reasonable prospect of conviction:

> The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds. (Victoria. Office of the Director of Public Prosecutions 1991, par. 5)

Some more general remarks can be made about this statement. The last sentence of this quotation makes it clear that the Guidelines are concerned not only about justice but also about the efficient use of resources. The quotation also seems to imply that a reasonably high success rate is to be expected; the phrase 'Indeed it is inevitable that some will fail' does not suggest an expectation that most will. The determination of 'a reasonable prospect of conviction' requires an assessment of the strength of the case, including the credibility of witnesses and their likely impression on the arbiter of fact. This last requirement explicitly demands an assessment of how the jury will respond to prosecution witnesses and to the whole prosecution case. The Guidelines also state that the reasonable prospects test 'presupposes that the jury will act in an impartial manner in accordance with its instructions'. (Victoria. Office of the Director of Public Prosecutions 1991, par. 4)

The requirement that a decision-maker assess the likely impact of evidence and witnesses upon the jury (presupposed to be impartial) creates the probability that the quality of evidence required to satisfy the reasonable prospect of conviction standard will vary according to kinds of offenders and offences. Thus, to take an example by Mansfield and Peay in a discussion of similar prosecution guidelines in England and Wales:

> If a High Court judge were accused of trivial shoplifting the DPP would require very strong evidence of *mens rea*, because if a defence of absent-mindedness seemed likely, the prosecutor might legitimately believe that the jury would be unlikely to convict a person with such a status and financial standing (Mansfield & Peay 1987, p. 16).

Mansfield and Peay also pointed to the dilemma that can be faced by prosecution authorities in deciding whether to proceed against police officers alleged to have committed serious offences. It seems that juries are inclined to believe police officers when they are defendants, especially if the evidence

against them comes from persons with prior convictions. If prosecutions believe this they will be more ready to accept that there is no reasonable prospect of conviction and so not proceed. In England and Wales there have been criticisms of the Director of Public Prosecutions for failure on occasion to proceed against police officers and it has been suggested that in such cases the standard is not 'reasonable prospect of conviction' but 'very reasonable prospect of conviction', a suggestion strongly denied by the Director Of Public Prosecutions (Mansfield & Peay 1987, p. 15). The point for this discussion is that a prosecution decision requiring an assessment of how a jury will respond to the evidence may well require different prosecution decisions for different kinds of offenders. If the response of the jury is a factor to be considered, then data such as that contained in the *Homicide Prosecutions Study* can be of considerable relevance, by pointing to patterns in jury verdicts and suggesting factors which are affecting case outcomes—for example, the gender of accused and victim in certain cases.

The effect of gender on homicide outcomes raises important questions about the meaning and effect of par. 13 of the Guidelines which states in part:

> A decision whether or not to prosecute must clearly not be influenced by:
>
> (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved (Victoria. Office of the Director of Public Prosecutions 1991, p. 65, par. 13).

However, if a prosecutor reasonably believes (as the evidence of the *Homicide Prosecutions Study* would seem to suggest) that a jury is unlikely to bring in a murder conviction against a female accused, is a decision to proceed only on manslaughter a decision that is influenced by the sex of the alleged offender? On one view of par. 13 of the Guidelines it clearly is, but on another view the decision is being made not on gender grounds but on outcome prediction, where the gender of the accused is but one factor. Presumably, par. 13 of the Guidelines is directed against decisions where sex, race or religion is a dominant, and irrelevant, factor.

In the area of homicide, where—according to the Guidelines—the seriousness of the matter will generally demand prosecution, there has been a belief among many prosecutors that if there is in a case some evidence of provocation and the basic elements of murder—causation and requisite intent—are present, there should be a presentment for murder since the question of provocation is essentially a jury question. Support for that position is provided by *Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 630—a recent decision of the High Court. In that case, which involved an indictment for murder in New South Wales where provocation was an issue, the High Court made a number of comments about the role of prosecution authorities—comments which do not appear to be confined to New South Wales. The majority (Mason CJ, Deane Gaudron and McHugh JJ.) in a single judgement stated that:

> it [sc. provocation] is an issue which may properly be considered by prosecuting authorities. They may decide that, on that account, manslaughter should be charged rather than murder. And, as

> foreshadowed in a letter from the Director of Public Prosecutions to the applicant's solicitors, they may also decide that, on that account, a plea of guilty to manslaughter should be accepted in satisfaction of an indictment for murder (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 632).

The majority judgement then went on to express the view that where provocation is a live issue, the prosecution should normally proceed on a murder charge:

> There is, for example, much to be said for the view that the question whether the prosecution has established that what would otherwise be murder is not reduced to manslaughter by provocation is, except in an exceptional case, best left for the determination of a jury entrusted with deciding whether, absent such a defence of provocation, the accused is guilty of murder. For one thing, any defence evidence on the primary charge of murder, which is unlikely to be led on the committal hearing or to be available to the prosecuting authorities before the trial, may throw significant light on the issue of provocation, especially the subjective element of that defence. In that regard, it needs to be borne in mind that a denial of one or other of the elements of a defence of provocation may well turn out to be at least implicit in the substantive case for the defence on the primary charge at the trial (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 634).

Brennan J., in a separate judgement, agreed with the majority that, in a murder case where provocation was in issue, the prosecution could indict for manslaughter or accept a plea of guilty to manslaughter. He then continued, in agreement with the majority:

> But, I would add, it should be an exceptional case before any of these powers is exercised so as to withhold the issue of provocation from a jury when the evidence is otherwise sufficient to establish a killing with intent to kill (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 636).

These views, in what is effectively an unanimous decision of the High Court, command great weight. However, in many cases questions about the intent of the accused and issues of self-defence may well also be present. In the Victorian study, of the fifteen cases presented for manslaughter where provocation was an issue, there was only one where the provocation was the sole issue (Law Reform Commission of Victoria 1991a, par. 150, p. 75). In many of these other cases, where provocation is but one (and perhaps a minor one) of a number of defence issues, *Kolalich v. Director of Public Prosecutions (NSW)* [1991], it is submitted, should not prevent a choice of manslaughter by the prosecution authorities.

There are other perspectives which need consideration. For some, a manslaughter conviction on a murder presentment is a satisfactory outcome. No doubt in many cases this is the case. The question, however, is whether that outcome could not in a significant number of cases be achieved more expeditiously and cheaply by acceptance of a plea of guilty to manslaughter. Moreover, the choice of presentment may well influence decisions on bail. Under

the *Bail Act 1977* (Vic.) (s. 13), bail is not to be granted to a person charged with murder unless the person deciding on bail 'is satisfied that exceptional circumstances exist which justify the making of such an order'. The *Homicide Prosecutions Study*, having noted that a 'bail was granted in 40.3 per cent of cases where the accused was presented for murder and in 74.2 per cent of cases of manslaughter', commented that these figures were 'presumably reflecting the differential operation of the bail provisions' (Law Reform Commission of Victoria 1991a, par. 117, p. 63). It is likely, too, that the maximum penalty for manslaughter in Victoria—fifteen years imprisonment—can be a disincentive against proceeding on manslaughter. In other jurisdictions, where the maximum penalty for manslaughter is life imprisonment, proceeding on manslaughter is not such a large step down. This is not to recommend an increase in Victoria for the maximum penalty for manslaughter, but merely to note the possible impact of the maximum on prosecution practices.

The fact is that, in the study period, less than one-third of murder presentments resulted in murder convictions, and in certain areas the success rate was much lower. There must be considerable doubt as to whether decisions-makers were in a number of cases in fact making a realistic assessment of the likelihood of conviction on the charge chosen.

The Future

What are the implications of the *Homicide Prosecutions Study* for the present and the future? It is a study covering a period some five-years odd. Patterns may vary and jury attitudes may change.

What the study has done is present an account—an audit if you like—of the prosecution process over a six-year period. The audit is, to continue the accounting metaphor, qualified. The information provided suggests that there may be deficiencies, that improvements might be needed.

But the *Study* also suggests the kinds of data and analysis that might assist prosecution decision-makers. Since 1987 there has been no readily available statistical data on the outcome of cases according to the nature of the presentment. Information, for example, is available on the number of persons convicted of manslaughter but not on the charge on which they were presented. The success rate, as defined in this paper, is not therefore readily obtainable. Given that, as the Prosecutorial Guidelines state, 'the decision whether or not to prosecute is the most important step in the prosecution process' (Victoria. Office of the Director of Public Prosecutions 1991, p. 59, par. 2), such information should be available.

The *Homicide Prosecutions Study* also points to the kind of more detailed data which can assist prosecutors. Information about the success rates of categories of homicide could be of considerable assistance in assessing likely outcomes of cases. This is not, of course, a suggestion of presentment by statistics—each case will obviously need to be assessed individually; but it could assist in predictions about outcomes and perhaps assist in improving consistency in decision-making. Furthermore, such information could not only improve the quality of prosecution decision-making, it would also assist policy analysts in assessing the performance of the prosecution authorities.

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